



DOD Proposed Regulations Prohibit Employer TRICARE Incentives

On March 28, 2008, the Department of Defense issued proposed regulations on the coordination of TRICARE – the health care program for active duty and military retirees and their families – with employer-sponsored group health plans.

Background

On October 17, 2006, President Bush signed into law H.R. 5122, the “John Warner National Defense Authorization Act for Fiscal Year 2007” (NDAA). Among other things, this law prohibits employers from offering any financial or other incentive to TRICARE-eligible employees to not enroll, or to terminate enrollment, in an employer-sponsored group health plan that is or would be primary to TRICARE. In so doing, the NDAA extends to the TRICARE program the same prohibition on group health plan incentives that currently applies to the Medicare program. On March 28, the Department of Defense (DOD) issued [proposed regulations](#) implementing the TRICARE incentive prohibition, which became effective January 1, 2008.

The Proposed Regulations

Like Medicare, TRICARE is a secondary payer to employer-provided health coverage. Many employers have begun to offer their TRICARE-eligible employees a TRICARE Supplement as an incentive not to enroll in the employer’s primary group health plan, shifting employee health costs to the DOD.

The proposed regulations would prohibit private and public sector employers with 20 or more employees from offering incentives to TRICARE-eligible employees not to enroll in employer-sponsored group health plans, just as Medicare prohibits employers from offering incentives to Medicare-eligible employees not to participate in employer-sponsored group health plans.

The proposed regulations closely track CMS regulations and associated guidance on the Medicare Secondary Payer (MSP) rules. Under these regulations, an employer may not offer TRICARE-eligible employees an alternative to the employer’s primary coverage unless the employee has primary coverage other than TRICARE or the benefit is a cafeteria plan offered under Section 125 to all employees.

As under the MSP rules, the proposed regulations would permit employers to offer all employees a choice between health coverage and cash payment equivalents through a cafeteria plan meeting Section 125 requirements. Thus, an employee could choose to take cash under the cafeteria plan and individually purchase a nonemployer-sponsored TRICARE Supplement plan sold by an insurer or beneficiary association. In such circumstances, TRICARE would be the primary payer and the TRICARE Supplement would be the secondary payer since nonemployer-sponsored plans continue to be expressly excluded as double coverage.

However, an employer could not provide a TRICARE supplement either outright or under a cafeteria plan because it would not be available to all employees and would improperly target TRICARE beneficiaries.

BUCK COMMENT. *The preamble to these regulations incorporates guidance in a May 2007 report from the DOD stating that TRICARE supplement plans may not be offered by an employer as an option under a group health plan. Thus, any employers still offering such plans after January 1, 2008 are technically in violation of the law.*

The proposed regulations clarify that they do not affect any TRICARE beneficiary's eligibility for health care or dental services and benefits under the Military Health System. As required under the law, the DOD has indicated it will conduct outreach to inform TRICARE-eligible beneficiaries of their legal rights and responsibilities and those of their employers.

Penalties for Noncompliance

Employers who fail to comply with the new regulations will be subject to civil penalties of up to \$5,000 for each violation.

Effective Date

The DOD has not proposed an effective date for the regulations, but has requested comments by May 27, 2008.

Conclusion

Employers still offering TRICARE supplements, whether or not through a cafeteria plan, need to eliminate this option as soon as possible. Buck's consultants would be pleased to discuss this latest guidance with you and its effect on your health plans.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.